Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00245-CV

IN RE Raymond **YBARRA**, Jr. and WildBlue Equipment, LLC

Original Mandamus Proceeding[1]

Opinion by: Karen Angelini, Justice
Dissenting Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Marialyn Barnard, Justice

Delivered and Filed: October 18, 2017

PETITION FOR WRIT OF MANDAMUS CONDITIONALLY GRANTED

Relators are the defendants in a personal injury lawsuit in Atascosa County, Texas. Relator WildBlue Equipment, LLC, employed Relator Ybarra as a driver. While in the course and scope of his employment, Ybarra was involved in an accident with Real Party in Interest Roy Alaniz. After a two-day trial, the jury returned a verdict finding Relators not negligent. Alaniz filed a motion for new trial, which the trial court granted. Relators brought this original proceeding to challenge the order granting new trial. We conditionally grant the petition for writ of mandamus.

[1] This proceeding arises out of Cause No. 2014-10-0900-CVA, styled *Roy Alaniz v. Raymond Ybarra, Jr. and WildBlue Equipment, LLC*, pending in the 81st Judicial District Court, Atascosa County, Texas, the Honorable John D. Gabriel Jr. presiding.

Background

The accident that led to this proceeding occurred on November 6, 2012. Over the course of the trial, the jury was presented with conflicting evidence with regard to the accident and Alaniz's injuries.

At trial, Alaniz testified he was traveling east on Bensdale Road in Pleasanton, Texas at 7:55 a.m. in his Ford F-150 pickup truck. As he approached the intersection at North Bryant Street, the traffic light at that intersection turned yellow. Alaniz slowed and stopped, and the light then turned red. Alaniz testified the intersection is located just east of a school zone where the speed limit is thirty miles per hour. According to Alaniz, after he stopped he saw Ybarra's Ford F-250 pickup truck approaching from behind. Alaniz stated that he could not see the driver of the truck as it approached. Alaniz testified "I still couldn't see his head until it was almost impact when I looked the last time in my rear view mirror when he hit me. Then I could see just barely the back part of his head." Alaniz estimated Ybarra was traveling at 45 miles an hour when he hit Alaniz. Alaniz described the impact as "hard" and testified he felt pain in his back, shoulders, and neck after the accident. Alaniz testified the force of the collision almost bent his truck in half and caused his seat to break loose from the hinges.

During the presentation of his case, Alaniz offered in evidence an excerpt from Ybarra's deposition.[2] In the excerpt, Ybarra admitted he was responsible for the accident, Alaniz did nothing to cause the accident, and Alaniz complained of neck and back pain immediately after the accident. Ybarra believed Alaniz was injured in the accident. Alaniz further offered a video excerpt from the deposition of Charles Ford, WildBlue's corporate representative. Ford testified

[2] The record originally filed with the petition for writ of mandamus did not include a transcript of the various video excerpts offered during the trial. The record was supplemented to include a full transcript.

that Ybarra prepared a written statement after the accident in which Ybarra opined that he was responsible for the accident. Ford stated that WildBlue agreed with Ybarra's statement.

Alaniz also offered a video excerpt from the deposition of Officer Smitty Gonzales, the police officer who responded to the accident. In the excerpt, Gonzales described how he conducted his investigation of the accident and discussed his crash report, which was admitted in evidence. According to Gonzales, when he arrived at the scene both trucks were still parked where they had been when the accident occurred. He spoke to both Alaniz and Ybarra and a "couple of" witnesses. Based on his observations of the scene and his interviews with the drivers and witnesses, Gonzales concluded Alaniz was stopped at the light and Ybarra was at fault for the accident. In his accident report, Gonzales included a notation that Ybarra caused the accident with contributing factors being a failure to control speed and driver inattention. Gonzales testified that he considered driver distraction and failure to control speed to be factors in the accident because he had seen these factors in other rear-end collisions.

According to Ybarra's trial testimony, he was working for WildBlue as a delivery driver at the time of the accident. Ybarra was driving from his home to the WildBlue office in Pleasanton the morning of the accident. Ybarra testified the accident occurred just after he passed through a school zone. According to Ybarra, he observed the thirty mile-per-hour speed limit as he drove through the school zone. Ybarra stated he saw Alaniz's truck at a yellow light, but then the morning sun got in his eyes and he was temporarily unable to see Alaniz or the light. Ybarra assumed Alaniz would proceed through the yellow light, and he did not see that Alaniz had stopped. Ybarra denied his head was below the dashboard and stated that, due to the size of his stomach, he could not get his head below the dashboard. Ybarra stated he caused the accident. Immediately after the accident, according to Ybarra, Alaniz got out of his truck and complained his back and neck were hurting. Ybarra testified the only visible damage to Alaniz's truck was

minor damage to the rear bumper. Jurors were also presented with photographs of both trucks after the accident.

After two days of testimony, most of which dealt with Alaniz's medical expenses, the case was submitted to the jury. Question number one of the jury charge read:

> **QUESTION NO. 1**
>
> Did the negligence, if any, of those named below proximately cause the occurrence in question? Answer "Yes" or "No" for each of the following:
> Raymond Ybarra, Jr./WildBlue Equipment, LLC

The jury question included the following definitions:

> "Negligence" means failure to use ordinary care. That is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.
>
> "Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.
>
> The jury answered "No" to question number one.

Alaniz filed a motion for new trial. The court granted the motion with an order stating the jury's verdict was against the great weight and preponderance of the evidence, and noting its reasons were "enunciated on the record" of the hearing on the motion for new trial. Relators then filed this original proceeding.

Analysis

Mandamus will issue only to correct a clear abuse of discretion for which the relator has no adequate remedy at law. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding). Traditionally, Texas trial courts were afforded very broad discretion in granting new trials, although that discretion was not unlimited. *In re Bent*, 487 S.W.3d 170, 175 (Tex. 2016); *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 210 (Tex. 2009); *Johnson*

v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985). However, in recent decisions the Texas Supreme Court's "jurisprudence has evolved to more firmly secure Texans' constitutional right to a jury trial in the new-trial context." *Bent*, 487 S.W.3d at 175.

The first case in which the supreme court addressed the impact of the constitutional right to a jury trial on the trial courts' discretion to grant new trials was *Columbia*. *See id.*, 175-76 (discussing cases reflecting the recent changes to new trial jurisprudence). Prior to *Columbia*, the supreme court had "approved the practice of trial courts failing to specify reasons for setting aside jury verdicts." *Columbia*, 290 S.W.3d at 208. In *Columbia*, the court disapproved of that approach. *Id*. at 213. The supreme court noted that the trial courts' authority to order new trials was never limitless and the trial courts' discretion in granting new trials did not "permit a trial judge to substitute his or her own views for that of the jury without a valid basis." *Id.* at 208. The court held that a new trial order must include an "understandable, reasonably specific explanation" for why a new trial was being ordered. *Id*. at 213.

After *Columbia*, the supreme court issued *In re United Scaffolding, Inc.*, 377 S.W.3d 685 (Tex. 2012), in which the court further expanded on the trial court's obligation when granting a new trial. In *United*, the supreme court held "a trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand." *United*, 377 S.W.3d at 688-89. The supreme court then identified examples of new trial orders that would constitute an abuse of discretion, such as an order that plainly shows the trial court merely substituted its judgment for that of the jury. *Id*.

The year following its opinion in *United*, the supreme court decided *In re Toyota Motor Sales, U.S.A., Inc*., 407 S.W.3d 746 (Tex. 2013). In *Toyota*, the supreme court addressed the question of "whether, on mandamus review, an appellate court may evaluate the merits of a new trial order that states a clear, legally appropriate, and reasonably specific reason for granting a new trial." *Toyota*, 407 S.W.3d at 757. The court noted that the courts of appeals were "reluctant to engage in a merits-based review of new trial orders." *Id*. The court restated the requirements for new trial orders set out in *Columbia* and *United Scaffolding*. *Id*. at 756-57. It then concluded that "[h]aving already decided that new trial orders must meet these requirements and that noncompliant orders will be subject to mandamus review, it would make little sense to conclude now that the correctness or validity of the orders' articulated reasons cannot also be evaluated." *Id*. at 758. "Appellate courts must be able to conduct merits-based review of new trial orders. If, despite conformity with the procedural requirements of our precedent, a trial court's articulated reasons are not supported by the underlying record, the new trial order cannot stand." *Id*.

Relators argue the trial court abused its discretion by finding the jury's verdict was against the great weight and preponderance of the evidence. Therefore, we review the trial court's ruling to determine if the trial court's reason for granting the new trial is supported by the underlying record. *Id*. We conduct this merits review by applying a factual sufficiency standard to a review of the entire trial record to determine if the record supports the trial court's reason for granting a new trial. *In re State Farm Mut. Automobile Ins. Co.*, 483 S.W.3d 249, 262 (Tex. App.—Ft. Worth 2016, orig. proceeding); *In re Zimmer, Inc.*, 451 S.W.3d 893, 905 (Tex. App.—Dallas 2014, orig. proceeding). If the record does not support the reasons for the new trial, then the trial court abused its discretion by granting a new trial. *State Farm*, 483 S.W.3d at 262. A factual sufficiency review of a new trial order in a mandamus proceeding is performed using the same standard as a factual sufficiency review in an appeal. *Id*.

When reviewing a verdict for factual sufficiency, the reviewing court considers all the evidence supporting and contradicting the jury's finding and should set aside the judgment only if the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *UPS v. Leal*, 468 S.W.3d 609, 615 (Tex. App.—San Antonio 2015, pet. denied). The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). A jury may believe or disbelieve the testimony of a witness, in whole or in part, and may resolve any inconsistencies in a witness's testimony. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). An appellate court may not substitute its judgment for that of the trial court; however, "neither may the trial court substitute its judgment for that of the jury in granting a new trial." *In re Wyatt Field Serv.*, 454 S.W.3d 145, 152 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding). The purpose of this court's review is to determine if the trial court substituted its judgment for that of the jury. *See id.* ("The method for ensuring that the trial court does not substitute its judgment for that of the jury, is to confirm that the court's reasons for granting a new trial are valid and correct, i.e., supported by the trial record.").

In the case now before this court, the new trial order stated it was "based on the reasons enunciated on the record by this Court on December 16, 2016, which included a ruling that the jury's verdict finding that Defendant Raymond Ybarra, Jr. was not negligent is against the great weight and preponderance of the evidence." The trial judge stated his reasons at the end of the hearing on Alaniz's motion for new trial:

> With regards to the "sun in my eyes" issue, you know, we discussed that a long time, and I've heard these arguments before. It was not an affirmative defense. But I know [Alaniz's attorney] is arguing that Mr. Ybarra, I guess, couldn't even say what happened. I didn't agree with that. But, obviously, the jury found no liability. But the issue is, is it against the, you know, greater weight of the, you know, the testimony in the case? You know, I know Mr. Ybarra somehow, someway said it was his fault. Yeah, the sun was in his eye but it was his fault. I don't remember

> who the corporate representative was, but something about -- yeah, the driver was at fault. And I don't know who said we were at fault, but I guess he said his driver was at fault.
>
> You know, I kind of looked at that *Klein* case and another case. And, yeah, the jury can find that there is no -- you know, neither side is negligent. But looking at those cases or at least the one I was looking at, the *Klein* case, somebody was falling [sic] closely and somebody couldn't go to the right or left. You know, I know in this case everybody passed the school zone. The plaintiff -- I forget everybody's name. Mr. Alaniz was at the stoplight. Said he was sitting there, and Mr. Ybarra just -- I know there were no skidmarks. There was no brakes. I guess if he did hit Mr. Alaniz he would have gone, it looks like, a red light was there.
>
> You know, just based on everything before the Court, I'm going to find that the jury's verdict was against the greater weight of the evidence, and I'm going to grant a new trial.

The judge's statements indicate the judge considered Ybarra's statements that he caused the accident conclusive on the issue of negligence and disregarded any other testimony from which the jury could have found no negligence on Ybarra's part. However, Ybarra's testimony and pre-trial statements that he was responsible for the accident do not constitute an admission of negligence. *See Campbell v. Perez*, No. 02-14-00248-CV, 2015 WL 1020842 at *3 (Tex. App.—Fort Worth 2015, no pet.) (mem. op.) (holding defendant's admission he was at fault was not an admission of negligence); *See also Benavente v. Granger*, 312 S.W.3d 745, 749-50 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding defendant's testimony he ran into plaintiff's car did not establish negligence). Although Ybarra admitted his vehicle hit Alaniz's vehicle, he did not admit he was driving in a negligent manner.

In addition, "[t]he mere occurrence of a rear-end accident is not of itself evidence of negligence." *Risinger v. Shuemaker*, 160 S.W.3d 84, 90 (Tex. App.—Tyler 2004, pet. denied); *DeLeon v. Pickens*, 933 S.W.2d 286, 289 (Tex. App.—Corpus Christi 1996, writ denied). The plaintiff in a rear-end accident case must prove specific acts of negligence on the part of the following driver. *Risinger*, 160 S.W.3d at 90; *Neese v. Dietz*, 845 S.W.2d 311, 314 (Tex. App.—

Houston [1st Dist.] 1992, writ denied). In a rear-end collision, "standards of ordinary care cannot be fixed with any degree of certainty but must be left in large measure to the trier of the facts." *Neese*, 845 S.W.2d at 314 (*quoting Gaitan v. Reyes Salvatierra*, 485 S.W.2d 602, 604 (Tex. Civ. App.—San Antonio 1972, no writ)). "The jury is not only the judge of the facts and circumstances proven, but may also draw reasonable inferences and deductions from the evidence adduced before it." *Gaitan*, 485 S.W.2d at 604.

Here the jury was presented with conflicting evidence regarding the accident. Alaniz described a high-speed impact that bent the frame of his truck. According to Alaniz, Ybarra's head was below the dashboard as he approached Alaniz and struck him. In contrast, Ybarra testified he was traveling slowly, having just exited a school zone, when the accident occurred. He stated his head was above the dashboard and the only reason he did not see that Alaniz stopped at the yellow light was because the rising sun momentarily blinded him. Ybarra described both trucks as having only minor damage such as would be expected from a slow speed impact. The jury viewed photographs of the damage done to both trucks.

After viewing the entire record we conclude the trial court erred by granting a new trial and setting aside the jury's verdict. The jury chose to believe Ybarra's version of the events leading to the collision, and determined that Ybarra had not failed to use ordinary care. That determination was within the jury's province. We are not free to disregard the jury's conclusion, and neither was the trial judge.

Conclusion

The evidence presented at trial was sufficient for the jury to conclude that Ybarra was not negligent in causing the accident. The trial court abused its discretion by granting the motion for new trial and thus substituting its judgment for that of the jury. Accordingly, we conditionally

grant the petition for writ of mandamus. Mandamus will issue only if the trial judge does not vacate his order granting new trial within thirty days of the date of this opinion.

Karen Angelini, Justice